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MICHAEL RODAK, J.

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-679

CHARLES WOLFF, JR., *et al.*,

Petitioners,

vs.

ROBERT O. McDONNELL, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE LEGAL AID SOCIETY OF NEW YORK, *AMICUS CURIAE*

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TABLE OF CONTENTS

PAGE

Interest of *Amicus* 1

Summary of Argument 3

Argument

The Due Process Clause of the Fourteenth Amendment requires that a prisoner be afforded basic procedural protection prior to the imposition of prison discipline 4

Conclusion 28

TABLE OF AUTHORITIES

Cases:

Alverez v. Turner, 422 F. 2d 214 (10th Cir. 1970) 11

Braxton v. Carlson, 483 F. 2d 933 (3rd Cir. 1973) 10, 14
Bundy v. Cannon, 328 F. Supp. 165 (D. Md. 1971) 22

Carrington v. Rash. 380 U.S. 89 (1965) 14
Cole v. Arkansas, 333 U.S. 196 (1948) 21
Colligan v. United States, 349 F. Supp. 1233 (E.D. Mich. 1972) 26
Collins v. Schoonfield, 344 F. Supp. 257 (D. Md. 1972) 22

Davis v. Alaska, —— U.S. ——, 42 U.S.L. Week 4295 (February 27, 1974) 23
Dodson v. Haugh, 473 F. 2d 689 (8th Cir. 1972) 24

Gagnon v. Scarpelli, 411 U.S. 778 (1973) 2, 25, 26
Gault, In re, 387 U.S. 1 (1967) 11, 21
Goldberg v. Kelly, 397 U.S. 254 (1970) 6, 14, 21, 22, 25, 27
Gonzalez v. United States, 348 U.S. 407 (1955) 27
Greene v. McElroy. 360 U.S. 474 (1959) 6, 22

PAGE

Hannah v. Larche, 363 U.S. 420 (1960) 6
Harman v. Forssenius, 380 U.S. 528 (1965) 14
Hill v. Texas, 316 U.S. 400 (1942) 14

Johnson v. Avery, 393 U.S. 483 (1969) 5
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) 6, 28

Kostal v. Tinsley, 337 F. 2d 845 (10th Cir. 1964) 4

Landman v. Peyton, 370 F. 2d 135 (4th Cir. 1966) 20
Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971) 21, 22, 24, 26

McCloskey v. Maryland, 337 F. 2d 72 (4th Cir. 1964) 4
McDonnell v. Wolff, 483 F. 2d 1059 (8th Cir. 1973) 14
Monks v. New Jersey State Board of Parole, 58 N.J. 238, 277 A. 2d 193 (1971) 27
Morrissey v. Brewer, 408 U.S. 471 (1972) 2, 5, 11

Newkirk v. Butler, 364 F. Supp. 497 (S.D.N.Y. 1973) 8
Nieves v. Oswald, 477 F. 2d 1109 (2d Cir. 1973) 16

Palmigiano v. Baxter, 487 F. 2d 1280 (1st Cir. 1973) 5, 7, 12, 14, 26
Powell v. Alabama, 287 U.S. 45 (1932) 25

SEC v. Chenery Corp., 318 U.S. 80 (1943) 27
Shapiro v. Thompson, 394 U.S. 618 (1969) 14
Sostre v. McGinnis, 442 F. 2d 178 (2d Cir. 1971) (*en banc*), *cert. denied sub nom.* Sostre v. Oswald, 404 U.S. 1049 (1972) 5, 14, 17

U.S. *ex rel.* Miller v. Twomey, 479 F. 2d 701 (7th Cir. 1973) 5, 7, 14
U.S. *ex rel.* Neal v. Wolfe, 346 F. Supp. 569 (E.D. Pa. 1972) 24

PAGE

Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966), aff'd 390 U.S. 333 (1968) 5
Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) 6
Wisconsin v. Constantineau, 400 U.S. 433 (1970) 6

Statutes and Regulations:

7 New York Code of Rules and Regulations:
§1.10(a) 9
Chapter V, pt. 253 16
§253.5 8
§253.5(a)(3) 9
§253.5(a)(4) 9

Miscellaneous Authorities:

ABA Resource Center for Correctional Law and Legal Services, SURVEY OF PRISON DISCIPLINARY PRACTICES AND PROCEDURES (April, 1974) 13
Bennett, I CHOSE PRISON (1970) 19
Feit, PRISON DISCIPLINE AND THE INMATE SENSE OF INJUSTICE (1971) 19
Fox, *Why Prisoners Riot*, 35 FED. PROB. 9, 13 (March, 1971) 12
Goffman, ASYLUMS (1961) 7
Goldfarb and Singer, AFTER CONVICTION (1973) 19
Jacob, *Prison Discipline and Inmate's Rights*, 5 HARV. CIV. RTS.—CIV. LIB. L. REV. 227 (1970) 23
Kansas Penal System, *Inmate Disciplinary Procedures* (August, 1972) 13
Millemann, *Prison Disciplinary Hearings And Procedural Due Process—The Requirement Of A Full Administrative Hearing*, 31 MD. L. REV. 27 (1971) 15, 23

PAGE

N.Y. Dept. of Corr. Serv., *Inmates' Rule Book* (Rev. ed. 1968) 21

NEW YORK STATE SPECIAL COMMISSION ON ATTICA ("McKay Commission"), THE OFFICIAL REPORT ON ATTICA (1972) 19

President's Commission on Law Enforcement and the Administration of Justice, TASK FORCE REPORT: CORRECTIONS (1967) 12, 24

South Carolina Dept. of Corrections, THE EMERGING RIGHTS OF THE CONFINED (1972) 15

Vermont Department of Corrections, *Disciplinary Regulations* (July, 1972) 13

Wright, THE POLITICS OF PUNISHMENT (1973) 18

Zimbardo, INTERPERSONAL DYNAMICS IN A SIMULATED PRISON (1972) 20

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BRIEF OF THE LEGAL AID SOCIETY OF NEW YORK, *AMICUS CURIAE*

Interest of *Amicus**

The Legal Aid Society is a non-profit organization incorporated under the laws of the State of New York for the purpose of providing legal assistance to persons too poor to afford the services of legal counsel.

* Letters of consent have been obtained from respondents' counsel and the Attorney General of the State of Nebraska, and are on file with the Clerk of the Court.

In September, 1971, the Society established a special litigation unit, the Prisoners' Rights Project, to protect the rights of prisoners in New York State. Since its inception, the Project has represented prisoners in a substantial amount of prison reform litigation in both state and federal courts. Project attorneys frequently visit New York prisons and receive a vast quantity of correspondence from prisoners and parolees.

Based on the Project's experience with New York's correctional system, *amicus* believes that the procedures by which prison discipline is imposed are of the utmost concern to the inmate population. As will be established in this brief, prison disciplinary action can affect not only the nature but also the duration of a prisoner's confinement. Accordingly, there is a critical need for sufficient procedural safeguards at disciplinary hearings in order to insure the fair imposition of prison discipline.

The purpose of this brief is to assist respondents in persuading the Court that the Fourteenth Amendment requires the same rudimentary procedural safeguards at prison disciplinary proceedings as were applied to parole revocation proceedings in *Morrissey* v. *Brewer*, 408 U.S. 471 (1972) and *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973). In support of our constitutional argument we will endeavor to convey to the Court what we have learned from our involvement with the New York prison system—an involvement which has led us to conclude that the procedural protection afforded by *Morrissey* and *Gagnon* is necessary to protect the interests of both the inmate and prison administration.

Amicus will not discuss the other issues in this case as we have not experienced substantial difficulties in these areas in New York State. As to each of these issues, however, we fully support the position of respondents.

Summary of Argument

The Court has frequently recognized that only through the application of traditional due process safeguards is accurate fact-finding insured and arbitrary governmental action avoided. In recent years, it has been established beyond a doubt that prisoners, like all citizens, are entitled to the protection of the Due Process Clause. Accordingly, rudimentary procedural protection should be afforded prisoners prior to the imposition of prison discipline.

Disciplinary action can cause a prisoner "grievous loss" by substantially altering both the nature and duration of his confinement. The prisoner's interest in avoiding that loss outweighs any interest the prison administration has in summary adjudication. Indeed, due process protection at prison disciplinary hearings would operate to promote, rather than defeat, the institutional goals of security and rehabilitation and would not present an unmanageable administrative burden.

Although the lower courts have been in agreement that fair disciplinary proceedings are constitutionally required, some courts have held that the particular safeguards of confrontation, cross-examination, counsel and the right to call witnesses are not necessary to insure fairness. However, factual disputes are as likely to occur in prison dis-

ciplinary hearings as in other adjudicatory settings, and in such cases a fair inquiry into the facts cannot be had in the absence of these safeguards. Furthermore, the peculiar nature of prison society creates a real possibility for abuse of the disciplinary process.

The minimum procedural requirements of the Due Process Clause have historically been the best techniques for discovering truth and insuring objective decision-making. In the context of prison disciplinary hearings, these requirements should include (a) prior written notice of the charges; (b) an impartial tribunal; (c) the opportunity to confront and cross-examine adverse witnesses and to call witnesses in one's own behalf; (d) representation by counsel and counsel substitute; and (e) a written statement of the evidence relied on and reasons for the decision.

ARGUMENT

The Due Process Clause of the Fourteenth Amendment requires that a prisoner be afforded basic procedural protection prior to the imposition of prison discipline.

I.

As recently as ten years ago, the customary judicial response to inmate allegations of mistreatment was to withhold relief in deference to the discretion of prison administrators.[1] At that time, for all practical purposes, the

1. *E.g., McCloskey* v. *Maryland*, 337 F. 2d 72, 74 (4th Cir. 1964); *Kostal* v. *Tinsley*, 337 F. 2d 845, 846 (10th Cir. 1964).

Constitution did not exist within prison walls. Today, however, after a decade of judicial decrees protecting the rights of those in custody, "it is well established that prisoners do not lose all their constitutional rights and that the Due Process and Equal Protection Clauses of the Fourteenth Amendment follow them into prison and protect them there from unconstitutional action on the part of prison authorities." *Washington* v. *Lee*, 263 F. Supp. 327, 331 (M.D. Ala. 1966), aff'd 390 U.S. 333 (1968). As the Court stated in *Johnson* v. *Avery*, 393 U.S. 483 (1969):

> There is no doubt that discipline and administration of state detention facilities are state functions. They are subject to federal authority only where paramount federal constitutional or statutory rights supervene. It is clear, however, that in instances where state regulations applicable to inmates of prison facilities conflict with such rights the regulations may be invalidated. 393 U.S. at 486.

Lower courts have not hesitated to intervene in internal prison affairs to protect prisoners from arbitrary, capricious or discriminatory treatment. The Due Process Clause has thus been invoked in prison cases to provide protection against discriminatory and arbitrary infliction of "grievous loss" upon prisoners by their keepers. *Palmigiano* v. *Baxter*, 487 F. 2d 1280 (1st Cir. 1973); *U.S. ex rel. Miller* v. *Twomey*, 479 F. 2d 701 (7th Cir. 1973); *Sostre* v. *McGinnis*, 442 F. 2d 178 (2d Cir. 1971) (*en banc*), *cert. denied sub nom. Sostre* v. *Oswald*, 404 U.S. 1049 (1972).

In *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), the specific requirements for minimum due process were made appli-

cable to parole revocation proceedings. Although *Morrissey* marked the first instance where the Court extended such procedural protection to individuals in custody, that decision is but another statement of the Court's frequent recognition that only through traditional due process safeguards is accurate fact-finding insured and arbitrary governmental action avoided. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1951); *Greene* v. *McElroy*, 360 U.S. 474 (1959); *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96 (1963); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). Thus, the Court's statement in *Wisconsin* v. *Constantineau*, 400 U.S. 433, 436 (1970): "It is significant that most of the provisions of the Bill of Rights are procedural, for it is procedure that marks much of the difference between rule of law and rule by fiat."

On numerous occasions this Court has described due process as a flexible concept. "[I]ts exact boundaries are undefinable and its content varies according to specific factual contexts." *Hannah* v. *Larche*, 363 U.S. 420, 442 (1960). The flexibility of the standard was thus articulated in *Goldberg*:

> The extent to which procedural due process must be afforded the [individual] is influenced by the extent to which he may be "condemned to suffer grievous loss," *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J. concurring), and depends upon whether the [individual's] interest in avoiding the loss outweighs the governmental interest in summary adjudication. 397 U.S. at 262-63.

In applying this test to prison disciplinary hearings it becomes clear that prior to the imposition of any discipli-

nary sanction an inmate should at least be afforded the rudimentary procedural safeguards set down in *Goldberg*. These safeguards include (a) prior written notice of the charges; (b) an impartial tribunal; (c) the opportunity to confront and cross-examine adverse witnesses and to call witnesses in one's own behalf; (d) representation by counsel and counsel substitute; and (e) a written statement of the evidence relied on and reasons for the decision. As will be established herein, only through the application of these safeguards will the interests of both the inmate and the prison administration be protected.

II.

There can be no doubt that an inmate who is charged with a violation of institutional rules is threatened with a "grievous loss" within the meaning of *Goldberg*. While it is obvious that inmates do not enjoy all the liberties of free persons, any liberties which they retain thereby achieve a greater significance. *Palmigiano* v. *Baxter, supra,* 487 F. 2d at 1284; *U.S. ex rel. Miller* v. *Twomey, supra,* 479 F. 2d at 719. Thus, their interest in fair disciplinary proceedings cannot be minimized. As Professor Goffman has observed:

> In general, the punishments meted out in total institutions are more severe than anything encountered by the inmate in his home world. In any case, conditions in which a few easily controlled privileges are so important are the same conditions in which their withdrawal has a terrible significance. GOFFMAN, ASYLUMS 50-51 (1961).

In New York, disciplinary decisions greatly affect an inmate's liberty within the prison system. For example, an inmate might be confined at one of seven maximum security institutions or at a medium security institution such as the Wallkill Correctional Facility. At the latter, inmates are permitted far more freedom of movement and have access to many more rehabilitative programs.[2] The determination whether an inmate is a suitable candidate for placement in Wallkill depends in large part on his disciplinary record at maximum security facilities.[3] Furthermore, once an inmate is at Wallkill, a single disciplinary infraction might result in his transfer back to a maximum security institution.[4]

Disciplinary infractions also determine the degree of liberty an inmate may have within his particular institution. Each institution in New York State contains a "special housing unit" where an inmate may be confined for up to sixty days as a result of a serious disciplinary infraction. 7 NYCRR §253.5. In a special housing unit, an inmate is deprived of many of the liberties of prison life. He is

2. See, *Newkirk* v. *Butler*, 364 F. Supp. 497, 500 (S.D.N.Y. 1973):

> [T]he conditions [in the maximum security institutions] contrast strikingly with those in Wallkill. * * * The cells are locked, the guards armed, the access to library and recreational facilities more limited, the space more crowded, and the rehabilitation programs significantly less extensive.

3. Walter Dunbar, former Executive Deputy Commissioner, New York Department of Correctional Services, testified to this fact on November 28, 1972 during the trial of *Newkirk* v. *Butler*, *supra*, n. 2.

4. This practice is described in "The Wallkill Story," a mimeographed public relations pamphlet distributed by the New York Department of Correctional Services.

segregated from the general prison population, confined to his cell for at least twenty-three hours a day, denied participation in educational and industrial programs and denied the opportunity to earn wages.[5]

A third consequence of disciplinary action might be removal from a rehabilitative program such as school, industrial training, work release or furlough. 7 NYCRR §253.5(a)(3). Participation in such programs is generally severely limited. As a result, removal might well mean that the inmate will not receive another such opportunity for months or even years.

In addition to jeopardizing an inmate's institutional liberty and his access to rehabilitative programs, disciplinary infractions also indirectly jeopardize his liberty in the traditional sense by reducing his chances for parole release. In New York, an inmate's disciplinary record is a major factor in determining his eligibility for parole. 7 NYCRR §1.10(a). Indeed, the Board of Parole has, on occasion, postponed an inmate's parole release hearing pending the outcome of disciplinary proceedings against him.[6] On other occasions, the Board has rescinded an unexecuted grant of parole where the potential parolee was

5. As a less severe punishment, an inmate may also be "keep-locked" for up to sixty days. 7 NYCRR §253.5(a)(4). This involves the same deprivations as confinement in a special housing unit except that the inmate is confined to his own cell and thus is not segregated from the inmate population.

6. For example, in July, 1973, the New York State Board of Parole postponed the parole release hearing of James Arnold, an inmate at the Great Meadow Correctional Facility and a client of *amicus*, because of institutional disciplinary charges pending against him. After Arnold was found guilty of these charges, the Board denied parole release and held him for an additional year.

found guilty of a disciplinary infraction after the grant of parole, but before his actual release.[7]

Consequently, inmates possess a significant quantum of liberty which may be threatened by disciplinary action. Unless there exists a substantial countervailing interest on the part of prison administrators, due process requires that there be sufficient procedural safeguards at disciplinary hearings to preclude deprivations of that liberty as the result of inadequate and, at times, biased factual determinations.

Prison administrators generally proffer three basic justifications in support of summary decision-making in the disciplinary process: first, that imposition of discipline is not truly adversarial in nature but merely a component of the rehabilitative and therapeutic scheme of incarceration;[8] second, that a requirement of due process protection prior to punishment would constitute a threat to institutional security;[9] and third, that procedural protection at disciplinary hearings would create a severe administrative burden and result in additional expenditure of public funds.[10]

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7. For example, Reginald Cook, an inmate at the Greenhaven Correctional Facility and a client of *amicus*, was granted parole on October 16, 1973, and was scheduled to be released on November 21, 1973. Prior to the release date, Cook was disciplined for several institutional infractions. On November 15, 1973, Cook was told that the Board of Parole had rescinded his parole and that he would have to wait another four months for release consideration.

8. See, *Braxton* v. *Carlson*, 483 F. 2d 933 (3rd Cir. 1973).

9. See, Brief of Petitioners, p. 28.

10. *Id.* at p. 41.

In light of the decisions of this Court and the writings of correctional authorities, these purported justifications do not withstand analysis. Indeed, it can be shown that due process protection at prison disciplinary hearings is consistent with the interests of prison administrators as it tends to promote, rather than defeat, the goals of security and rehabilitation.

The argument that due process does not apply where adjudicatory proceedings are rehabilitative or therapeutic has been firmly rejected by the Court. In *In re Gault*, 387 U.S. 1 (1967), the Court rejected the invocation of *parens patriae* as justification for withholding procedural safeguards at juvenile proceedings. Similarly in *Morrissey* v. *Brewer, supra*, 408 U.S. 471, the Chief Justice noted that the procedural protections required therein were consistent with the purposes of parole:

> [S]ociety has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness. 408 U.S. at 484.[11]

That fairness operates as a constructive force in rehabilitative efforts has also been recognized by the President's Commission on Law Enforcement and Administration of Justice:

> The necessity of procedural safeguards should not be viewed as antithetical to the treatment concerns of corrections. The existence of procedures both fair in

11. Prior to the *Morrissey* decision, the rehabilitative nature of revocation proceedings had been used as a justification for denying procedural protection. See, *Alverez* v. *Turner*, 422 F. 2d 214, 217 (10th Cir. 1970) (parole revocation hearing need not be adversarial since "the decision to revoke parole is prognostic.").

> fact and perceived to be fair by offenders is surely consonant with the "collaborative regime" emphasized as desirable by modern corrections, in which staff and offenders are not cast as opponents but are united in a common effort aimed at rehabilitation. In a prison no less than in society as a whole, respect for and cooperation with authority requires the guaranty of fairness. President's Commission on Law Enforcement and the Administration of Justice, TASK FORCE REPORT: CORRECTIONS 13 (1967).

In addition to jeopardizing rehabilitation, the prisoner's impression of disciplinary hearings as unfair may engender such bitterness as to present a threat to prison security. As Chief Judge Coffin has observed:

> [T]he orderly care with which decisions are made by the prison authority is intimately related to the level of respect with which prisoners regard that authority. There is nothing more corrosive to the fabric of a public institution such as a prison than a feeling among those whom it contains that they are being treated unfairly. *Palmigiano* v. *Baxter, supra,* 487 F. 2d at 1283.

Unfair disciplinary methods have in fact been termed one of the major causes of prison riots:

> Readiness to riot results from predisposing causes such as * * * oppressive custodial discipline, sadistic staff quick to write disciplinary charges against inmates, and a general punitive attitude by administration and line personnel. Fox, *Why Prisoners Riot,* 35 FED. PROB. 9, 13 (March, 1971).

It is undisputed that in emergency situations prison officials have the right to act promptly and immediately,

and we do not urge that an administrative hearing is necessary *prior* to the imposition of discipline in such cases. The normal disciplinary case, however, does not occur in an emergency setting. In the ordinary course of prison affairs, administrative hearings would have no detrimental effect on security. Rather, the impression of fairness engendered by such hearings would seem far more likely to prevent inmate disturbances.

The argument that basic due process protection at disciplinary hearings would cause an undue administrative burden and expense may well be illusory. A recent survey of nationwide disciplinary practices conducted by the American Bar Association's Resource Center for Correctional Law and Legal Services[12] indicates that many jurisdictions have not found the burden unmanageable. The survey found that twenty-nine jurisdictions presently allow inmates to call relevant witnesses at disciplinary hearings, twenty-eight allow inmates to cross-examine adverse witnesses and fourteen permit the inmate representation by counsel. While some of these jurisdictions have adopted such safeguards as a result of litigation, others have done so on their own initiative.[13]

However, the question of whether or not procedural due process would cause an administrative or financial burden is without constitutional significance. The Court has re-

12. ABA Resource Center for Correctional Law and Legal Services, *Survey of Prison Disciplinary Practices and Procedures* (April, 1974).

13. See, Kansas Penal System, *Inmate Disciplinary Procedures* (August, 1972); Vermont Department of Corrections, *Disciplinary Regulations* (July, 1972).

jected at every turn arguments that have urged limitations *in the definition* of constitutional rights based upon assertions of unavailable resources by the States. *Goldberg* v. *Kelly, supra,* 397 U.S. at 266; *Harman* v. *Forssenius,* 380 U.S. 528, 542 (1965); *Shapiro* v. *Thompson,* 394 U.S. 618, 633 (1969); *Carrington* v. *Rash,* 380 U.S. 89, 96 (1965). In short, the meaning of the Due Process Clause does not fluctuate in proportion to the number of persons who seek justifiable refuge in it. The rights afforded by the Constitution are personal rights "which the State must respect, the benefits of which every person may demand * * *. [I]ts safeguards extend to all." *Hill* v. *Texas,* 316 U.S. 400, 406 (1942).

III.

Having applied the *Goldberg* test to prison disciplinary proceedings, the lower courts are in agreement that the inmate's interest in fair decison-making outweighs any governmental interest which would sacrifice fairness. There has, however, been significant disagreement as to precisely what procedural safeguards are necessary to insure fairness in the prison context. *McDonnell* v. *Wolff,* 483 F. 2d 1059 (8th Cir. 1973) [this case]; *Palmigiano* v. *Baxter, supra,* 487 F. 2d 1280; *U.S. ex rel. Miller* v. *Twomey, supra,* 479 F. 2d 701; *Sostre* v. *McGinnis, supra,* 442 F. 2d 178; *Braxton* v. *Carlson,* 483 F.2d 933 (3d Cir. 1973).

Sostre, the leading case rejecting basic procedural protection, involved a disciplinary proceeding in which there had been no real dispute of fact. The only issue concerned the propriety of Sostre's admitted jailhouse lawyering, his refusal to discuss a black liberation group referred to in

his letters and a reference in a letter to his impending "liberation." Upon this record, the court of appeals held that Sostre was entitled to a "minimally fair and rational" inquiry based upon "facts rationally determined." 442 F. 2d at 198. However, the court declined to require the specific due process safeguards of confrontation, cross-examination, counsel, and the right to call witnesses.

Sostre's holding that a "minimally fair and rational inquiry" can be had in the absence of full due process protection has been severely criticized and for good reason. As Professor Millemann has written:

> It is an empty promise to guarantee fairness while omitting the tools necessary to accomplish that fairness. If there is no requirement of due process at a disciplinary hearing, then the proceeding would simply follow this scenario: inmate Jones comes before a disciplinary panel; inmate Jones is told that he has been accused of committing a certain act of misconduct; inmate Jones is asked what "his side of the story is"; and, in the overwhelming number of cases, inmate Jones is told that he is guilty. Without vehicles for discovering truth and insuring objectivity administrative proceedings become a sham and a means for legitimizing arbitrariness. Millemann, *Prison Disciplinary Hearings And Procedural Due Process—The Requirement Of A Full Administrative Hearing*, 31 Md. L. Rev. 27, 50 (1971).

See also, South Carolina Dept. of Corrections, The Emerging Rights of the Confined 108 (1972).

The Second Circuit itself recently cast doubt on the continued vitality of the *Sostre* standard. In a prison

discipline case containing numerous factual disputes concerning the role of certain inmates in the Attica rebellion, the court held that the right to cross-examination as well as to other due process safeguards had not been "inescapably foreclosed" by *Sostre* and noted that in *Sostre*, "we did not state that none of the rejected safeguards were ever to be constitutionally required in any case * * *." *Nieves* v. *Oswald*, 477 F. 2d 1109, 1113 (2d Cir. 1973).

Factual disputes are as likely to arise in prison disciplinary hearings as in any other adjudicatory setting. When such disputes occur, it is virtually impossible for an inmate to establish innocence at a hearing conducted in accordance with the *Sostre* standard. For example, in July of 1973, three inmates at the Great Meadow Correctional Facility were accused by another inmate of having raped him. Institutional disciplinary hearings were held where each of the three denied this serious charge and named alibi witnesses to establish that each was not even present at the time and place of the alleged rape. Each also requested an opportunity to confront and cross-examine the inmate levelling the accusation and to be permitted representation by counsel. In accordance with the rules governing prison disciplinary hearings in New York State,[14] all of these requests were denied, no witnesses were called, and the three prisoners were disciplined solely on the basis of the accusing inmate's written allegations.[15]

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14. 7 NYCRR, Ch. V, pt. 253.

15. Superintendent's Proceedings of James Arnold, Joseph Elfe and Neurha Short, Great Meadow Correctional Facility, Comstock, New York, July 31, 1973. These facts are the subject of a civil rights action, *Elfe, et al.* v. *Preiser, et al.*, 73 CV 482, filed by the Prisoners' Rights Project in October, 1973, in the United States District Court for the Northern District of New York.

In a second case, an inmate at the Ossining Correctional Facility was charged with challenging a correction officer to a fight. At the disciplinary hearing, the inmate pleaded not guilty and submitted a list of five inmate witnesses whom he wished to have testify. Each of these witnesses would have corroborated the inmate's story that the officer had provoked the incident by pushing the inmate without any justification or provocation. As in the previous example, the witnesses were not permitted to testify and the inmate was found guilty solely on the basis of the officer's written report.[16]

In each of these examples, the inmates faced with disciplinary action were left with "a reasonable opportunity to explain [their] actions" [*Sostre* v. *McGinnis, supra,* 442 F. 2d at 198] as their only means of defense. In the first example, this explanation could only be a declaration that they did not know anything about the incident in question. In the second, any explanation would necessarily involve asking the prison disciplinary board to believe the word of a single inmate over the word of a correctional officer. There can be little question that both of these defenses are of minimal worth.

In cases such as those detailed above, the absence of full procedural protection necessarily prevents the "minimally fair and rational inquiry" into the facts assumed possible by *Sostre.* Indeed, without greater procedural protection than a *Sostre*-type rule affords, there is likely to be no genuine inquiry.

16. Superintendent's Proceeding of Dennis Yarrell, Ossining Correctional Facility, Ossining, New York, January 10, 1972.

Observers of hearings similar to those countenanced by *Sostre* have noted the disciplinary board's inclination to accept a reporting officer's version of the facts without questioning its accuracy. Erik Olin Wright, who attended Adjustment Committee Proceedings at San Quentin, described the normal procedure:

> When [the prisoner] entered the room he was told by the chairman of the committee to sit down and then was read the formal charge of which he was accused. The chairman then asked the prisoner what he had to say for himself. There followed a brief interrogation by each of the committee members, after which the prisoner was told to leave the room and wait outside. The committee then discussed the case for two or three minutes and reached a decision about what punishment should be given the prisoner. *In none of the cases which I witnessed was there any discussion of the possible innocence of the accused prisoner; all that was discussed was the appropriate harshness of the punishment.* Wright, THE POLITICS OF PUNISHMENT 83-84 (1973) (emphasis added).

Ronald Goldfarb and Linda Singer have witnessed the same phenomenon in other states:

> In Wisconsin, for example, there are hearings before a Disciplinary Committee whenever a prisoner is punished for a "substantial" violation. However, based on his observations of the procedure at the State Reformatory, a legal intern concluded: "In essence, the committee takes the facts as stated in the [guard's] conduct report to be true, thus creating a presumption of guilt which is difficult if not impossible for the inmate

to overcome." Our observations of hearings in prisons in other states bear out this conclusion. When there is a substantial question of a prisoner's guilt, the usual practice is to find him guilty but give him a mild sentence. Goldfarb and Singer, AFTER CONVICTION 493 (1973).[17]

The procedural protection afforded by *Sostre* is also inadequate because of the peculiar nature of prison society. Certain unique pressures and relationships exist in prisons which make the need for a close examination of the facts underlying disciplinary action particularly acute. An example of this has been described by a former Director of the Federal Bureau of Prisons:

> [T]he prison society has its way of enforcing its rules. Gambling, for example, is illegal in federal prisons. • • • [W]elching on a bet, however, is a sin to be avenged by some subtle method, such as planting dope or a knife beneath the offender's bed and tipping off an officer. Bennett, I CHOSE PRISON 28 (1970).

Another reality of prison life is that prison guards are likely to be poorly educated,[18] and poorly trained[19] yet

17. Indeed, many inmates have expressed the belief that protestations of innocence may result in a harsher penalty. Thus, in the face of this heavy presumption of guilt, they will admit the violation regardless of whether or not they are guilty. See, Feit, PRISON DISCIPLINE AND THE INMATE SENSE OF INJUSTICE 33 (1971).

18. See the testimony of John B. Greenholtz, Chairman, Nebraska Board of Paroles, and former Deputy Warden, Nebraska Penal and Correctional Complex. Appendix, p. 19.

19. See generally, NEW YORK STATE SPECIAL COMMISSION ON ATTICA ("McKay Commission"), THE OFFICIAL REPORT ON ATTICA 27-28 (1972).

vested with near total control over the lives of inmates.[20] In view of this, there exists a real possibility that they will misuse their authority.[21] Thus, disciplinary procedures such as those established in *Sostre*, which permit an inmate to be punished solely on the basis of a guard's written report, will necessarily constitute an invitation to arbitrariness.

IV.

Throughout our constitutional history, the minimum procedural requirements of the Due Process Clause have proven to be the most effective devices for the discovery of truth and insuring objective decision-making. Although their value has been repeatedly underlined by the Court,

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20. For an analysis of the possible effects of this total control on the guards themselves, see Zimbardo, INTERPERSONAL DYNAMICS IN A SIMULATED PRISON (1972). Professor Zimbardo created a simulated prison at Stanford in which well-adjusted college students role-played prisoners and guards for an extended period of time. At the termination of the study, Zimbardo concluded that:

> Being a guard carried with it social status within the prison, a group identity (when wearing the uniform), and above all, the freedom to exercise an unprecedented degree of control over the lives of other human beings. This control was invariably expressed in terms of sanctions, punishment, demands and with the threat of manifest physical power. There was no need for the guards to rationally justify a request as they did in their ordinary life, and merely to make a demand was sufficient to have it carried out. *Id.* at 41.

21. See, *Landman* v. *Peyton*, 370 F. 2d 135, 140 (4th Cir. 1966):

> Acton's Classic proverb about the corrupting influence of absolute power is true of prison guards no less than other men. In fact, prison guards may be more vulnerable to the corrupting influence of unchecked authority than most people. It is well known that prisons are operated on minimum budgets and that poor salaries and working conditions make it difficult to attract high calibre personnel. Moreover, the "training" of the officers in methods of dealing with obstreperous prisoners is but a euphemism in most states.

it will be helpful to discuss briefly the necessity of each individual procedural requirement in the context of prison disciplinary hearings.

(1) Prior Written Notice of the Charges

The most clearly established principle of due process is that timely and adequate notice must be furnished the party proceeded against. *Cole* v. *Arkansas*, 333 U.S. 196, 201 (1948); *In re Gault*, 387 U.S. 1, 33 (1967); *Goldberg* v. *Kelly, supra*, 397 U.S. at 267-268. In prison, notice is particularly important because the rules governing inmate conduct are generally extremely vague and uncertain.[22] Without specific written notice of the charges an inmate will have no opportunity to adequately present his version of the incident or to insure that the hearing is kept within bounds. *Landman* v. *Royster*, 333 F. Supp. 621, 660 (E.D. Va. 1971).[23]

(2) Impartial Tribunal

Whether or not an individual receives a fair hearing ultimately depends on the fairness of the tribunal.

In prison, the nature of institutional society creates serious doubt as to whether any prison employee could be a

22. In New York, for example, there are prohibitions against such things as "vulgar language", "insolence" and "boisterous noise". N.Y. Dept. of Corr. Serv., *Inmates' Rule Book*, Rules 6, 7, 42 (Rev. ed. 1968).

23. The Prisoners' Rights Project recently filed a civil rights action in the United States District Court for the Southern District of New York seeking, *inter alia*, an order compelling the Commissioner of Correctional Services to promulgate and distribute a complete listing of all rules and regulations governing inmate conduct "in sufficiently clear and explicit language so as to prevent inconsistent application, arbitrariness and favoritism." *Betancourt, et al.* v. *Preiser, et al.*, 74 Civ. 1113.

truly impartial member of an disciplinary tribunal. Thus, some lower court decisions have required that at least one member of the tribunal be from outside the prison staff. See *Bundy* v. *Cannon*, 328 F. Supp. 165 (D. Md. 1971); *Collins* v. *Schoonfield*, 344 F. Supp. 257 (D. Md. 1972). At a minimum, however, each member of the tribunal must be free of any prior involvement with the incident under examination so that he may decide the case on the basis of the evidence at the hearing. *Landman* v. *Royster, supra*, 333 F. Supp. at 653.

(3) Confrontation, Cross-examination and Witnesses

The right to confront and cross-examine opposing witnesses has been accepted as being appropriate and necessary "[i]n almost every setting where important decisions turn on questions of fact." *Goldberg* v. *Kelly, supra*, 397 U.S. at 269. The importance of these rights cannot be overestimated. As Chief Justice Warren wrote in *Greene* v. *McElroy*, 360 U.S. 474 (1959):

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formulized these protections in the requirement of confrontation and cross-examination. * * * This Court has been zealous to

> protect these rights from erosion. It has spoken out not only in criminal cases * * * [citing] but also in all types of cases where administrative and regulatory actions were under scrutiny. 360 U.S. at 496-97.

In *Davis* v. *Alaska*, —— U.S. ——, 42 U.S.L. Week 4295 (February 27, 1974), the Court again underscored the paramount importance of the right of cross-examination notwithstanding the state's strong and legitimate policy of preserving the confidentiality of juvenile records. 42 U.S.L. Week at 4299.

That prison guards, like other citizens, may at times be motivated by "malice, vindictiveness, intolerance, prejudice or jealousy" is beyond doubt. The necessity for confrontation and cross-examination, therefore, is no less in the context of prison disciplinary hearings. Significant denials of liberty based upon the unchallenged testimony of a faceless accuser are simply not consistent with concepts of fundamental fairness and traditional notions of procedural due process. Millemann, *Prison Disciplinary Hearings And Procedural Due Process—The Requirement Of A Full Administrative Hearing, supra,* 31 Md. L. Rev. at 51; see also Jacob, *Prison Discipline and Inmates' Rights,* 5 Harv. Civ. Rts.—Civ. Lib. L. Rev. 227, 247 (1970).

The traditional rationale for denying cross-examination at prison disciplinary hearings has been that the questioning of correctional officers by inmates would erode the inmate-staff relationship.[24] This rationale, however, is based on an archaic correctional philosophy the most current attribute of which is its frequent repudiation. As the

24. See Brief of Evelle J. Younger, Attorney General of the State of California, *Amicus Curiae,* at p. 10.

President's Commission on Law Enforcement has found, "[d]enying offenders any chance to challenge arbitrary assertions of power by correctional officials * * * [is] inconsistent with the correctional goal of rehabilitation, which emphasizes the need to instill respect for and willingness to cooperate with society and to help the offender assume the role of a normal citizen." TASK FORCE REPORT: CORRECTIONS 82 (1967). Numerous lower courts, in requiring confrontation and cross-examination, have also rejected this rationale.[25] As Judge Merhige has stated:

> The Court appreciates the concern of prison officials that interrogation by prisoner of the guard force may be at variance with their ordinary respective positions in the penal hierarchy. Because most disciplinary cases will turn on issues of fact, however, the right to confront and cross-examine witnesses is essential. *Landman* v. *Royster, supra,* 333 F. Supp. at 653.

Witnesses are also necessary to a fair hearing. "Fact finding is not complete unless illuminated by the testimony of witnesses called by both adversaries." *U.S. ex rel. Neal* v. *Wolfe,* 346 F. Supp. 569, 574-75 (E.D. Pa. 1972). Obviously in any situation where an inmate may have alibi witnesses he will not be able to present a defense unless they are permitted to testify.[26]

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25. *Amicus* relies on the Brief of Respondents for a full listing of these decisions.

26. See *Dodson* v. *Haugh,* 473 F. 2d 689, 690-91 (8th Cir. 1972):

> [I]n this case Iowa's procedure should be reviewed to determine whether they were likely to have established the truth of the asserted violation. * * * For all we know, Dodson may be able to show that he could have called witnesses at his disciplinary hearing who would have established an airtight alibi or mistaken identification by the correctional officer who testified against him. * * * Without an examination of any of the underlying facts, the district court erred in dismissing this action.

(4) Counsel and Counsel Substitute

The right to counsel has long been recognized as an essential element of due process. As was said in *Powell* v. *Alabama*, 287 U.S. 45 (1932), "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." 287 U.S. at 68-69. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the individual. *Goldberg* v. *Kelly, supra,* 397 U.S. at 270-71.

In the prison setting, the absence of counsel may render all other procedural safeguards meaningless. Mr. Justice Powell's observation in *Gagnon* v. *Scarpelli,* 411 U.S. 778, 786-87 (1973), easily adapts itself to the context of prison disciplinary hearings:

> [T]he effectiveness of the rights guaranteed by *Morrissey* may in some circumstances depend on the use of skills which the probationer or parolee is unlikely to possess. Despite the informal nature of the proceedings and the absence of technical rules of procedure or evidence, the unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-examining of witnesses or the offering or dissecting of complex documentary evidence.

Amicus is well aware that requiring the states to appoint counsel in all disciplinary hearings might present an unnecessary administrative burden, and thus such a requirement is not urged herein. However, because of the

vital need for counsel in some disciplinary cases, we urge the Court to adopt the test set forth in *Gagnon* and rule that counsel should be provided in those cases where,

> after being informed of his right to request counsel, the [inmate] makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation * * * or (ii) that, even if the violation * * * is uncontested, there are substantial reasons which justified or mitigated the violation * * * and that the reasons are complex or otherwise difficult to develop or present. *Gagnon* v. *Scarpelli, supra,* 411 U.S. at 790.

In all disciplinary cases, however, an inmate should be permitted to bring retained counsel [*Palmigiano* v. *Baxter, supra,* 487 F.2d 1280; *Landman* v. *Royster, supra,* 333 F. Supp. 621] or where none is available, a counsel substitute such as a law student or fellow inmate. See, *Colligan* v. *United States,* 349 F. Supp. 1233, 1238 (E.D. Mich. 1972). The assistance of counsel would enable an inarticulate inmate to present his case in an organized fashion and would insure that all procedural safeguards are observed. The presence of counsel might benefit the prison administration as well. As the court noted in *Palmigiano*:

> Counsel might provide correctional administrators with useful guidance in novel situations where no procedural rules had as yet been developed. And because the precise rudiments of prison disciplinary hearings exist in a developing area of the law where no firm guidelines exist, trained legal counsel may be of important assistance in reaching accommodations between inmates and administrators which would avoid the necessity of continued litigation. 487 F. 2d at 1292.

(5) Written Findings of Fact and Reasons for the Decision

The concept of fundamental fairness has led the Court to declare that administrative bodies must provide written findings of fact and reasons. *Goldberg* v. *Kelly, supra,* 397 U.S. at 271; *Gonzalez* v. *United States,* 348 U.S. 407 (1955); *SEC* v. *Chenery Corp.,* 318 U.S. 80 (1943). Similarly, requiring disclosure of reasons upon which disciplinary rulings are based is crucial to the maintenance of fairness, as it will preclude insulation of such decisions from scrutiny. Indeed, where there is no statement of findings of fact and reasons for the disciplinary decision, the harm caused by the vagueness of prison regulations[27] is greatly compounded. Cf. *Monks* v. *New Jersey State Board of Parole,* 58 N.J. 238, 277 A. 2d 193 (1971).

In sum, the need for the procedural safeguards outlined above is as great in prison as in other areas. And what Mr. Justice Frankfurter once wrote in a related context merits restatement here:

> Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. At least such is the conviction underlying our Bill of Rights. That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depends on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy

27. See footnote 23, *ante.*

of serious loss, notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done. *Joint-Anti Fascist Refugee Committee* v. *McGrath, supra,* 341 U.S. at 171-172 (concurring opinion).

Conclusion

For the above reasons the judgment of the court below should be affirmed.

Respectfully submitted,

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